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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARK AARON VAUGHN, Defendant and Appellant.	E066443 (Super.Ct.No. RIF129904) O P I N I O N

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge. Affirmed.

Cindy Brines, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Steve Oetting and Warren J. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Mark Aaron Vaughn, requested modification of his sentence in the instant case to include striking imposition of punishment for a prior felony prison term which another court had subsequently reduced to a misdemeanor. The court denied defendant's request. On appeal, defendant contends the court erred by denying his request. We affirm.

I. PROCEDURAL HISTORY

On September 29, 2010, the People filed a felony information alleging defendant had committed first degree burglary (count 1; Pen. Code, § 459) while a person other than an accomplice was present (Pen. Code, § 667.5, subd. (c)(21)), two counts of unlawfully driving or taking of a vehicle (counts 2-3; Veh. Code, § 10851, subd. (a)) after having suffered a prior conviction for theft of a vehicle (Pen. Code, § 666.5, subd. (a)), and attempted theft of a vehicle (count 4; Pen. Code, § 664; Veh. Code, § 10851, subd. (a)). The People additionally alleged defendant had suffered six prior prison terms within the meaning of Penal Code section 667.5, subdivision (b)[1] for the following convictions: (1) vehicle theft with a prior on November 5, 2003; (2) vehicle theft with a prior on November 4, 2002; (3) vehicle theft with a prior on June 30, 1998; (4) vehicle theft on September 9, 1993; (5) felon in possession of a firearm on April 3, 1992; and (6) receiving stolen property on June 2, 1989. On October 5, 2010, a jury convicted defendant on the substantive counts.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

After a court trial on the prior conviction allegations, the People agreed they had failed to prove the first prior prison term allegation; the allegation was stricken. The court found the remaining allegations true. The court sentenced defendant to an aggregate term of imprisonment of 10 years, including a consecutive term of one year on the prior prison term for which defendant was convicted on June 30, 1998.

On June 24, 2016, defendant filed a modification of sentence requesting the court to reduce his sentence by a year since another court had reduced his conviction on June 30, 1998 for felony vehicle theft with a prior to a misdemeanor pursuant to section 1170.18. The court denied the motion, noting the "[p]rior was valid at time of sentence. It remains. Prior cannot be used in any future sentence."

II. DISCUSSION

Defendant contends the provisions of the section 1170.18 resentencing scheme also apply retroactively to sentences imposed on section 667.5, subdivision (b) prior prison term enhancements which have subsequently been reduced to misdemeanors. Thus, defendant argues that since another court had subsequently reclassified his June 30, 1998 substantive conviction for vehicle theft from a felony to a misdemeanor, the court below should have stricken the one-year consecutive sentence it imposed on that conviction in the instant case as a prior prison term enhancement.[2] We disagree.

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[2] Both parties acknowledge that the California Supreme Court has granted review in a number of cases in which the precise issue at hand was addressed. In the lead case, *People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted March 30, 2016, S232900, the court has framed the issue as whether "defendant [is] eligible for resentencing on the penalty enhancement for serving a prior prison term on a felony

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In the November 4, 2014 election, California voters enacted Proposition 47, "The Safe Neighborhoods and Schools Act" (Proposition 47 or the Act) and the Act went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).) "Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.)

Under subdivision (f) of section 1170.18, a person who has completed his or her sentence for a felony conviction that would have been a misdemeanor under the Act may apply to the court that entered the judgment of conviction to redesignate the conviction as a misdemeanor. The court is required to designate the conviction as a misdemeanor "[i]f the application satisfies the criteria in subdivision (f) [of section 1170.18] . . . ." (§ 1170.18, subd. (g).)

"Section 1170.18 [also] provides a mechanism by which a person currently serving a felony sentence for an offense that is now a misdemeanor, may petition for a recall of that sentence and request resentencing in accordance with the offense statutes as added or amended by Proposition 47. [Citation.] A person who satisfies the criteria in

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conviction after the superior court had reclassified the underlying felony as a misdemeanor under the provisions of Proposition 47."<http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2135098&doc_no=S232900>[as of May 22, 2017].

subdivision (a) of section 1170.18, shall have his or her sentence recalled and be 'resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' [Citation.]" (*T.W. v. Superior Court* (2015) 236 Cal.App.4th 646, 649, fn. 2.)

"The focus of these procedures is redesignation of *convictions*, not enhancements. Neither procedure provides for either the recall and resentencing or the redesignation, dismissal, or striking of sentence enhancements. [Citation.] No similar provision provides a process for offenders to seek to strike or otherwise redesignate sentencing enhancements. It follows that nothing in the language of section 1170.18 allows or even contemplates the retroactive redesignation, dismissal, or striking of sentence enhancements imposed in a final judgment entered before Proposition 47 passed, even where the offender succeeds in having the underlying conviction itself deemed a misdemeanor." (*People v. Jones* (2016) 1 Cal.App.5th 221, 228-229, review granted Sept. 14, 2016, S235901.) Thus, because defendant's prior prison term conviction remained a felony at the time he was convicted in the instant case, imposition of a consecutive one-year term on the enhancement was proper and cannot be recalled or stricken pursuant to section 1170.18. The court properly denied defendant's motion for modification.

As in *People v. Jones*, *supra*, 1 Cal.App.5th at page 229, defendant contends that section 1170.18, subdivision (k) provides the statutory basis for altering sentencing enhancements. That subdivision states: "Any felony conviction that is recalled and

resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) *shall be considered a misdemeanor for all purposes . . . .*" (Italics added.) Accordingly, defendant argues that since the conviction underlying his prison prior was deemed a misdemeanor, section 1170.18, subdivision (k) required the superior court to treat the offense as a misdemeanor for *all purposes*, including for the purpose of a prior prison term enhancement. Thus, defendant argues, his prior conviction, now a misdemeanor, no longer supports imposition of the enhancement.

"We assume, without deciding, that [section 1170.18,] subdivision (k) bars a post-Proposition 47 sentencing court from imposing a section 667.5, subdivision (b) enhancement based on a prior felony conviction that has been redesignated as a misdemeanor. It does not follow, however, that subdivision (k) allows the courts to strike prison prior enhancements imposed prior to Proposition 47 based on prior convictions redesignated as misdemeanors after judgment and sentence have become final. The first case involves the *prospective* application of section 1170.18, subdivision (k). The second case . . . involves its *retroactive* application. We conclude subdivision (k) does not apply retroactively." (*People v. Jones*, *supra*, 1 Cal.App.5th at p. 229.)

"No part of the Penal Code is retroactive, unless it expressly so declares. [Citations.] Proposition 47 does not contain a provision declaring its provisions automatically retroactive. Instead, it provides procedures making its provisions *available* retroactively to certain offenders who petition for resentencing or redesignation of their convictions. [Citations.] Thus, Proposition 47 has retroactive effect only to the extent

section 1170.18 provides a procedure to petition for reclassification or resentencing." (*People v. Jones, supra*, 1 Cal.App.5th at p. 229.)

"[S]ection 1170.18 provides no such procedure for the retroactive dismissal or striking of enhancements. Absent express language in section 1170.18 allowing the redesignation, dismissal, or striking of past sentence enhancements, we cannot infer voters intended the Act to apply retroactively to past sentence enhancements. As a result, the direction of section 1170.18, subdivision (k) that any redesignated conviction 'shall be considered a misdemeanor for all purposes,' applies, at most, prospectively to preclude future or non-final sentence enhancements based on felony convictions redesignated as misdemeanors under Proposition 47." (*People v. Jones, supra*, 1 Cal.App.5th at p. 230.) Thus, the court properly denied defendant's motion.

III. DISPOSITION

The judgment is affirmed.

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.